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No. A-65

IN THE SUPREME COURT OF THE

UNITED STATES

October Term, 1976

76-354

ROBERTO VASQUEZ, Petitioner

vs.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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The Petitioner, Roberto Vasquez, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in this case on the 9th day of July, 1976.

OPINION BELOW

The opinion of the court of appeals (App. A, pp. 25-34, infra) is not yet reported.

JURISDICTION

The judgment of the court of appeals (App. A., pp. 25-34, infra) was entered on July 9, 1976. The mandate was issued August 2, 1976 (App.B p.35 infra) The jurisdiction of this Court is involved under 28 U.S.C. I 1254 (1).

QUESTIONS PRESENTED

Did the Fifth Circuit error in affirming the

district court's action in not granting Petitioner's motion to suppress his confession which was the fruit of Petitioner's illegal arrest and unconstitutional detention under the Fourth Amendment to the United States Constitution?

Whether the Fifth Circuit errored in affirming the district court's action allowing a powerfully incriminating extrajudical statement of a co-defendant, who stood accused side by side with Petitioner deliberately spread before the jury in their joint trial thereby violating Petitioner's Sixth Amendment right of cross-examination, and in disregard of BRUTON V. UNITED STATES, 391 US 123, 20 L Ed 2d 476, 88 S Ct 1620?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED.

A. United States Constitution

1. Amendment IV to the United States Constitution provides:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oatn or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

2. Amendment VI to the United States Constitution provides:

"In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance

of Counsel for his defense."

Statutes:

21USC § 846 and 21 USC § 841 (a) (1)

STATEMENT

ROBERTO VASQUEZ, Petitioner herein, was indicted on June 5, 1975, along with five others for violations of 21 USC § 846 and 21 USC § 841 (a) (1). He allegedly on February 2, 1975, conspired to knowingly and fraudulently possess marihuana, and that said Petitioner did knowingly and intentionally possessed with intent to distribute approximately 1,137 pounds of marihuana. The indictment was in two counts, the second only charging Petitioner and four others. A jury trial was had on August 14, 1975, before the Honorable William S. Sessions, where the Petitioner entered a plea of not guilty as to both counts of the indictment. The jury found Petitioner guilty on both counts on August 15, 1975, and the Court sentenced him to five (5) years imprisonment on Count 1 with a special parole term of eight (8) years and three (3)

years imprisonment on count 2, with a special parole term of five (5) years. Count 2 was to run consecutively to count 1.

A hearing on the motion to suppress was heard before the Honorable William S. Sessions on July 10, 1975. The motion to suppress was filed; which alleged that the oral confession was inadmissible for the reason that it was tainted by an illegal detention arising from the illegal arrest of Petitioner.

The evidence briefly stated at trial reflect that customs patrol officer Epps testified that on February 26, 1975, at approximately 1:30 in the morning in the Acola Esperanza area by the Rio Grande River, separating Mexico and the United States, he and his partner Kenneth Wright, observed headlights coming from the Rio Grande River from what is known as the west road of Balluco Arroyo. They observed the lights come on up and hit a farm road FM-192, and turn west on FM-192. They started following this vehicle which was a green and white Ford van for the sole reason that it didn't belong

in that area.

As the officers approached the town of Esperanza, and while still following the Ford van, they observed two vehicles coming towards them. The first van made no attempt to stop as it approached the two vehicles. During all this time the officers did not have their headlights on. The first vehicle looked like it was making a U-turn. The officers turned their headlights on, and the Ford van increased its speed. The officers began to pursue the Ford van and as it passed the town of Esperanza proceeding west on FM-192 the Ford van failed to negotiate a curve and crashed. When the officers approached the scene they turned on their red overhead roof lights, and observed what appeared to be a large quantity of marihuana over an area around the van.

At this time the two other vehicles were behind the officers. Officer Epps testified that he attempted to flag down the two vehicles as they approached him but they continued going without stopping. At approximately 2:30 a.m. the El Paso Police Department stopped the van with the license plate observed by

Officer Epps and matching the description that Officer Epps had obtained. Petitioner and three other subjects were apprehended in the 9400 block of Socorro Road, some 60 miles away from the scene of the wrecked van. At the scene of the wreck an individual was found dead, who had been critically injured in the wreck.

Officer Epps testified to the fact that the reason he had the van stopped which Petitioner was in, was that that van was in the same proximity as the van that turned over and scattered marihuana, that it slowed down to look at the wreck, and that it made no attempt to stop. However, during the entire episode from the time Officer Epps observed the vehicles until the time that van overturned and the other two vehicles past him he never saw any of the occupants of those two vehicles talking with each other, stop or in any manner indicate that these two vehicles were together. Nor, was evidence adduced which indicated that the two vehicles were with the van that overturned.

The evidence at the motion to suppress concerning the issue of Petitioner's confession consist of the

following: The customs partol officers spotted the van which eventually failed to negotiate the curve and turned over at approximately 1:30 a.m. on February 26, 1975. At approximately 2:30 a.m. the El Paso Police stopped the van which Petitioner was in on Soccorro Road in El Paso, Texas. At 2:25 a.m. officers began tracking a subject who had fled the scene on f-ot. After the van in which Petitioner was in was stopped on Soccorro Road and Avenida De Las American in Soccorro Texas, Petitioner and other subjects were brought out of the van.

After the van Petitioner was in was stopped in Soccorro, Texas, Agent Ismael Fuentes of the Drug Enforcement Agency, arrived at the Soccorro scene sometime after 3:30 a.m., and questioned Mr. Pablo Ruiz-Aguilar, he illicted from him the fact that on the night of February 26, 1975, he had been picked up by Petitioner, and that he had gone down to assist in the transportation of marijuana. Agent Fuentes testified to Aguilar's statements, at Petitioner's joint trial with the other co-defendants, of which Pablo Ruiz-Aguilar was one such co-defendant who did not take the stand. Fuentes' testimony came in over Petitioner's timely and proper objection.

The trial court did not grant a severance nor did the court instruct the jury that agent Fuentes' testimony could not be used against Petitioner.

After Petitioner had arrived at the county jail that same morning at approximately 6:30 a.m., and Fuentes had already talked to Petitioner, and told him officer Jose Contreras had arrived, and talked to Petitioner at the jail this is when Petitioner's confession was taken which will be discussed more fully under the appropriate issue. The trial court overruled Petitioner's motion to suppress.

REASONS FOR GRANTING THE WRIT

ISSUE NUMBER ONE

The Fifth Circuit by affirming the case at bar has decided an important Federal Constitutional question that is in apparant conflict with principles announced by this Court in BROWN V. ILLINOIS, 422 US 590 45 L Ed 2d 416, 95 S Ct 2254 in that Petitioner's confession was the fruit of his illegal arrest and unconstitutional detention under the Fourth Amendment to the United States Constitution. The basic question which this Court must determine is whether the arrest which led to VASQUEZ's conviction was valid. In essence the issue is whether there was probable cause to stop, arrest, and question VASQUEZ on February 26, 1975 in Socorro, Texas.

In the case at bar, after the van which Petitioner was in had been stopped and agent Fuentes had arrived at the Socorro scene, and the Petitioner had already been transported to the El Paso County Jail several hours later Fuentes interviewed VASQUEZ. He confronted Petitioner with the facts he had, and Petitioner apparently

submitted; said he'd cooperate. But, he wanted to speak to Joe Contreras who was a detective with the Task Force of the D.E.A.. Petitioner was alleged to have made the following statements to detective Contreras, which Contreras testified to and which came into evidence in the Government's case in chief: (Record on Appeal 317-319)

> ". . . so he (VASQUEZ) went on to relate that he was the money man for the operation, that three loads of 500 pounds each were to be crossed across the border in the vicinity of McNary, Texas, into the United States.
>
> Also, that he (VASQUEZ) was to wait at the Sun Valley Motel somewhere close to Ysleta, and he was going to be the money man for the operation and that the - - - when the loads were crossed, they were to be placed inside two vans which would be positioned somewhere in the vicinity of Zaragosa and Alameda and that two unidentified anglo males were going to come and see the marijuana, and after they would see the marijuana, they would go to the motel and pay him the money.
>
> However, all of this did not occur due to the fact that the incident where one person died in an accident, because he was called from Mexico by an unidentified person and advised him to go warn the people to come back to El Paso, because somebody had put the finger. In other words, somebody had squealed or whatever you want to call it.
>
> So he then went on to state that he went with his girl-friend to the vicinity of McNary, Texas, to warn the people. However, as he was approaching the point, the crossing point, he saw an overturned van, and he then fled the scene.

> . . . he mentioned some guns had been purchased.
>
> . . . he mentioned that he had rented either two or three rooms - - - don't recollect how many but I remembered the room that he told me he was staying was apartment no. - - - well room 23, I believe . . . "

The van VASQUEZ was in was stopped and Petitioner was arrested on marijuana charges. Officer Epps while in the Esperanza area and after the first van turned over and he tried to flag down Petitioner's van and the other vehicle he requested that these later two vehicles be stopped, and detained. Petitioner's vehicle was subsequentley stopped, detained and arrested in the 9400 block of Soccorro in El Paso, Texas, by the El Paso Police. This was some 60 miles away from the scene where the green van had overturned and the marijuana found. Petitioner was arrested without a warrant.

In 1925 in CARROLL V. UNITED STATES, 267 US 132, 69 L Ed 543, 45 S Ct 280, this Court noted "travelers may be so stopped in crossing an international boundary because of national self protection, reasonablly requiring one entering the country to identify himself as entitled to come in, and his belongings as effects which may lawfully brought in. But those lawfully within

the country, entitled to use public highways, have a right to free passage without interruption or search unless there is" * * * a warrant with probable cause or probable cause plus exigent circumstances.

It is the contention of VASQUEZ that officer Epps had no probable cause to have the El Paso Police officers stop him while driving a van truck on February 26, 1975, and that the arrest was made without probable cause, and that the confession which was subsequently obtained by officer Contreras was the fruit of the poisonous tree. All that officer Epps had was the fact that the green van which he intially followed turned over and scattered marijuana on the road. He saw the van which Petitioner was in appear to make a U-turn, and the fact his van slowed down to look at the wreck, and that when Petitioner apparently saw Epps standing in the middle of the road Petitioner made no attempt to stop whatsoever. In fact the reason why Epps ordered the police to stop Petitioner's van was on Epps' mere suspicion, and he wanted Petitioner (who he could not identify) held for customs to ascertain if they were connected with the other van on the basis that Petitioner's van was in the

area at the time, that according to Epps Petitioner and the other vehicle did not belong in that county, and the fact that Petitioner and the other vehicle did not stop when Epps was trying to flag them down.

In fact Epps had no evidence or knowledge at all that any of the vehicles there in Esperanza at 1:30 in the morning were connected or together. See AGUILAR V. TEXAS, 378 US 108, 12 L Ed 2d 723, 84 S Ct 1509; WHITELEY V. WARDEN OF WYOMING PENITENTIARY, 401 US 506, 28 L Ed 2d 306 at 312, 91 S Ct 1031.

This Court must look to what Officer Epps had as his factual basis, and not what the El Paso Police had from Epps when they stopped Petitioner's van in Socoorro. In MARSH V. UNITED STATES, 5th Cir. 344 F 2d 317, it is apparent that the test as to probable cause is the information known to the officer who requests another officer to effect an arrest. Here Epps possessed no such probable cause in fact, he could not even identify the occupants in Petitioner's van.

The Government argued that there was probable cause because when officer Epps tried to flag Petitioner

down to stop immediately after the first van overturned, Petitioner continued going, this argument must likewise fail. First, Officer Epps admitted that he was attempting to stop Petitioner and the other subjects, mainly for identification, because there was very little traffic in that area, and the fact that the vehicles were there at the same time the one van that overturned and he thought they should identify themselves. Officer Epps had no legal right to try and stop these vehicles for such a purpose. Custom agents are not general guardians of the public place, as are State or local police. Their powers are limited by Title 19 USC §482. By claiming that the subjects failed to stop for him Epps is attempting to bolster a mere suspicion into probable cause.

Secondly, the fact tnat Petitioner may have tried to flee the area is not sufficient to constitute probable cause, although it may be a factor to be considered. UNITED STATES V. JACQUILLIN, 469 F 2d 380 (5th Cir. 1972). JOHNSON V. MIDDLEBROOK, 5th Cir. 383 F 2d 386.

FRUIT OF THE POISONOUS TREE

It is Petitioner's further contention that the stopping of Petitioner in Socoorro was illegal, and that from that point on, Petitioner VASQUEZ was illegally kept in custody by the Government agents; had VASQUEZ not been illegally detained in Socoorro, and subsequently at the El Paso County Jail there would have been no opportunity for detective Contreras to have obtained the confession herein in question, nor in fact would Petitioner ever have been questioned by agent Fuentes, or detective Contreras, and no confession would have ever been given. It is Petitioner's contention that the confession was vitiated and inadmissible because it was predicated upon an illegal custody. The result in this case was a chain of events which led directly from the illegal detention to the giving of the alleged confession while Petitioner was significantly deprived of his freedom. The Government in this case utilized the products of the illegal detention namely the confession which was used against Petitioner in the Government's case in chief. The confession which was obtained from VASQUEZ while he was in illegal custody comes within the

rule that Fruits of the Poisonous Tree must be suppressed. WONG SUN V. UNITED STATES, 371 US 471, at 485.

Petitioner's intial stopping was illegal, and he was illegally detained, the El Paso Police officers who stopped him had no probable cause, and they had no right to seize and detain VASQUEZ. The agents utterly failed to comply with the techinical requirements of an arrest warrant.

The lower court in BROWN V. ILLINOIS, 422 US590 45 L Ed 2d 416, 95 S Ct2254though recognizing the unlawfulness of the defendant's arrest, held that the statements were admissiable on the ground that the giving of MIRANDA warnings served to break the causual connection between the illegal arrest and the giving of the statements, and defendant's act in making the statements was sufficiently an act of free will to purge the primiary taint of the unlawful arrest. This Court held that "the Miranda warnings, alone and per se cannot always make the act sufficiently a product of free will to break, for fourth amendment purposes, the causual connection between the illegality and the confession."

In the case at bar MIRANDA warnings may have been given Petitioner, but Petitioner's illegal detention was made without probable cause or an arrest warrant. Officer Epps had no probable cause to have Petitioner detained, and Petitioner was detained for the sole purpose of conducting an exploratory and inquisitorial questioning upon Petitioner. Furthermore, Petitioner was in custody by the officers throughout the entire period of time, he had only a twelfth grade education, his alleged confession was tainted by his illegal detention, furthermore, this confession was taken before Petitioner was lawfully arraigned.

ISSUE NUMBER TWO

By affirming the case at bar the Fifth Circuit has decided an important Federal Constitutional question that is in conflict with principles announced by this Court in BRUTON V. UNITED STATES, 391 US 123, 20 L Ed 2d 476, 88 S Ct 1620, and at the very least, the lower court in the case at bar departed from a course of judicial proceedings as to deprive Petitioner of a fair trial calling for this court to exercise its supervisory power over the federal courts.

After the van which Petitioner was in was stopped in Soccorro, agent Fuentes arrived at the scene in the area of Zaragosa. He then escorted Pablo Ruiz-Aguilar, (a co-defendant), to the left-front side of the van, and Aguilar made certain statements to Fuentes. Fuentes testified over trial counsel's objection that Aguilar had made certain statements to the effect that: Petitioner had picked him (Pablo Ruiz-Aguilar) up earlier, and that he went down there to assist in the transportation of marijuana. That they followed a certain routine "something to the effect that

they turned their lights on or off, that he did not know who was going to bring the marijuana across and all that he was going to do was assist in the transportation of marijuana." Aguilar also stated to agent Fuentes "it was a big mistake, and that he was real disappointed about everything."

Pablo Ruiz-Aguilar was a co-defendant, and was tried in a joint trial with Petitioner. The aforementioned testimony was spread before the jury, over trial counsel's timely objection. Just prior to Fuentes' testimony, trial counsel had taken agent Fuentes on Voir Dire out of the presence of the jury. Trial counsel objected to agent Fuentes' testimony on the ground that defendendant would not have an opportunity to cross-examine the defendant, Pablo Ruiz-Aguilar, and confront witnesses against him.

BRUTON V. UNITED STATES, 391 US 123, 20 L Ed 2d 476, 88 S Ct 1620, dealt with a situation where during a joint trial of one Evans and Bruton of a federal charge of armed postal robbery, at which

Evans did not testify, a postal inspector testified to Evans' oral confession that Evans and Bruton had committed the robbery. The trial court there instructed the jury that although Evans' confession was competent evidence against Evans, it was inadmissible hearsay against Bruton and must be disregarded in determining Bruton's guilt or innocense. This Court said:

> "We hold that, because of the substantial risk that the jury, dispite instructions to the contrary, looked to the incriminating extra-judicial statements in determining petitioner's guilt, admission of Evans', confession in this joint trial violated petitioner's right of cross-examination secured by the confrontation clause of the Sixth Amendment. We therefore, overrule Delli Paoli and reverse."

In the case at bar, the prejudice in Petitioner's case was extremely serious because of the powerfully incriminating extrajudicial statements of Aguilar, a co-defendant, who stood accused side by side with the Defendant were deliberately spread before the jury in a joint-trial. In this cause there was not "any recognized exception to the hearsay rule" which would allow agent Fuentes' testimony to be admitted against Petitioner. For Aguilar's statements to Fuentes were

made after the defendants were arrested. At that time no conspiracy was continuing, and Aguilar's statements could not possibly be construded in furtherance of the conspiracy which Petitioner and the co-defendants stood charged.

In the case at bar, Aguilar did not take the stand, and Petitioner could not call him, as he was a co-defendant. So this case is not like NELSON V. O'NEIL, 402 US 622, 29 L Ed 2d 222, 91 S Ct 1723. The introduction of Aguilar's incriminating extra-judicial statement powerfully incriminated Petitioner, as it tied Petitioner into the crime by picking up Aguilar and proceeding to attempt to transport marijuana at the time in question, and since it is Petitioner's contention that his confession was tainted because it was taken while he was in illegal custody, the introduction of Aguilar's incriminating extrajudicial statement, added crucial weight to the Government's case in a form not subject to cross-examination, since Aguilar did not take the stand. Hence, Petitioner's right of cross-examination secured by the confrontation clause of the Sixth Amendment was violated.

POINTER V. TEXAS, 380 US 400 S Ct 1065, 13 L Ed 2d 923; BARBER V. PAGE, 390 US 719, 88 S Ct 1318 20 L Ed 2d 255 (1968). See also GRAY V. UNITED STATES, 407 F 2d 830 (5th Cir. 1969).

It is admitted that trial counsel did not move for a severance nor did he request that the court instruct the jury "that although Aguilar's statements were competent evidence against Aguilar, it was inadmissiable hearsay against Petitioner and must be disregarded in determining Petitioner's guilt or innocence." As to the latter curative instruction, it is Petitioner's contention that no such instruction to the jury could have eleminated the damaging and prejudical effect to Petitioner's defense, BRUTON V. UNITED STATES, supra, and at the very least the trial court should have given such an instruction sua sponte, which might have lessened somewhat the prejudical and damaging effect of agent Fuentes' testimony as to what Aguilar had told him.

That although the Fifth Circuit held that if there was a BRUTON violation it was harmless error

beyond a reasonable doubt, it is hard to see this because the case at bar involves an extrajudicial admission of one defendant that inculpates Petitioner. That said statements were used in the Government's case in chief, and that they were crucial to the Government's case. It involved a joint trial and the wholesale denial of cross-examination. BROOKHART V. JANIS, 384 US 1 86 S Ct 1245, 16 L Ed 2d 314 (1966).

CONCLUSION

For the reasons stated, the petition for writ of certiorari should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, JOSEPH A. CALAMIA, one of the attorneys for the Petitioner, ROBERTO VASQUEZ, and a member of the Bar of the Supreme Court of the United States, hereby certify that on this the 31st day of August, 1976, I served three copies of the foregoing petition for writ of certiorari each, on the following:

1. On Mr. William B. Hardie, Assistant United States Attorney for the Western District of Texas, El Paso Division, by mailing him three copies of the same at his offices, Federal Courthouse Building, El Paso, Texas, 79901.

2. On the United States by mailing three copies thereof in a duly addressed envelope, to the Honorable Robert H. Bork, United States Solicitor General, United States Department of Justice, Washington, D. C.

Joseph A. Calamia
JOSEPH A. CALAMIA

APPENDIX "A"

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 75-3623

UNITED STATES OF AMERICA
Plaintiff-Appellee,

versus

ROBERTO VASQUEZ and
ERNESTO CHAVEZ-CORTINAS,
Defendants-Appellants.

Appeal from the United States District Court
for the Western District of Texas

July 9, 1976

Before THORNBERRY and AINSWORTH,
Circuit Judges, and
HOFFMAN*, District Judge

THORNBERRY, Circuit Judge:

Appellants Roberto Vasquez and Ernesto Chavez-Cortinas challenge their convictions for conspiracy to possess marijuana with intent to distribute and for possession of marijuana with intent to distribute. See 21 U.S.C. §§ 841(a)(1), 846. Appellant Vasquez

*District Judge of the Eastern District of Virginia, sitting by designation.

contends that his confession following his arrest, which was introduced against him in the court below, was inadmissible on two grounds: first, the confession was the fruit of an illegal arrest and detention, and second, the confession lacked the requisite degree of voluntariness. Appellant Vasquez contends also that certain testimony given in the trial court violated his rights under Bruton v. United States, 391 U.S. 123, 88 S.Ct. 1620, 20 L Ed. 2d 476 (1968). With the discussion that follows, we reject these arguments and affirm the convictions of appellant Vasquez. Appellant Chavez-Cortinas, on the other hand, concedes the propriety of his conviction under section 841(a)(1) for possession of marijuana, but he argues that the Government introduced insufficient evidence to link him as a participant in a conspiracy chargeable under section 846. A commonsense review of the evidence introduced by the Government convinces us, however, that sufficient evidence was before the jury to sustain its verdict against appellant Chavez-Cortinas on the conspiracy count. Accordingly, we affirm also his convictions under sections 841(a)(1) and 846.

In the early morning hours of February 26, 1976, Customs Patrol officers Gary Epps and Kenneth Wright were on still watch in the Balluco Arroyo area west of Esperanza, Texas. The area is a known entrance and exit point across the Rio Grande River, the international boundary between the United States and Mexico. At approximately 1:30 a.m., the officers observed automobile headlights approach their position from the direction of the river, then move up the west access road of Balluco Arroyo, and finally turn onto Farm Road 192 in a westward direction. With their automobile headlights turned off, but riding under a full moon, the officers commenced to follow the interloper along Farm Road 192 at a distance sufficient to prevent detection. After travelling three or four miles in this manner, the officers rounded a curve in the road. At this time, Epps and Wright, who had been decreasing steadily the distance between themselves and the interloper, were able to identify the latter as a green and white Ford van. Officer

Epps testified also that, as he and his partner rounded the curve into Esperanza, the Ford van "appeared to meet" two other vehicles, a green Dodge van and gold Oldsmobile Toronado, both of which stopped in the middle of the road to make a U-turn and follow the Ford van in its westward direction. As they came around the curve, it was necessary for the officers to switch on their automobile headlights, swing wide around the Toronado and the Dodge van both stationary in the middle of the road, and continue their pursuit of the Ford van, which had already passed the Toronado and the Dodge van. Alerted to the presence of an unknown automobile, the Ford van accelerated rapidly, and a high-speed chase ensued between the Ford van and the officers. The Ford van failed to negotiate a curve leading up to Interstate 10, the highway to El Paso, and rolled over an indeterminate number of times. As the officers came upon the scene of the crash, they observed a large amount of marijuana scattered over the road and one subject - a young male with long black hair and wearing a green fatigue jacket - running into the brush away from the demolished van. The fleeing subject turned out to be appellant Chavez-Cortinas, who was apprehended several hours later in the desert. A second occupant of the Ford van was killed in the crash. The Dodge van and the Toronado came upon the accident scene shortly after officers Epps and Wright stopped their Customs Patrol car. Officer Epps stepped into the road where, in full uniform he was illuminated by the headlights of the overturned van. The rotating red light and other emergency lights on the Customs Patrol car were switched on, and Epps, with flashlight in hand, attempted to wave the two vehicles to a halt to ascertain what they were doing in the area. The first vehicle to pass was the Dodge van. It was necessary for Epps to move out of the road to avoid being struck by this vehicle. He was able, however, to record the license plate number of the Dodge van. Epps's encounter with the second vehicle, the gold Toronado, was somewhat more harrowing. Epps testified that as the Toronado approached the accident scene, it accelerated and swerved toward him. Epps jumped from the

path of the Toronado. Recovering his feet, Epps saw both vehicles head west on Interstate 10 toward El Paso. He immediately radioed this information including the license plate number of the Dodge van, to his Communications Sector, which in turn relayed the information to all available law enforcement authorities.

At 2:30 a.m., one hour after officers Epps and Wright spotted the headlights coming from the river in the Balluco Arroyo, the Dodge van, identified by description and license plate number, was stopped by officers of the El Paso Police Department some sixty miles from the crash site. Appellant Vasquez, his girl friend who testified later for the Government, and two male suspects were taken from the van. All, except the girl friend, were placed face down on the ground. Approximately one hour later, between 3:30 and 4:00 a.m., Special Agent Fuentes with the Drug Enforcement Administration arrived on the scene. The three suspects were allowed to stand at this time for questioning by Agent Fuentes. One of the suspects, Pablo Aguilar, was questioned separately by Agent Fuentes and stated, among other things that the only person who could provide details to the authorities was appellant Vasquez. Somewhat later, at the El Paso Sheriff's Department Booking Room, Agent Fuentes had his first opportunity to question appellant Vasquez. After being fully informed of his rights, appellant Vasquez stated that he was willing to cooperate with the authorities, but that he preferred to speak with officer Jose Contreras, an El Paso police detective attached to the DEA Task Force. Officer Contreras was notified and arrived at the County Jail arround 7:00 a.m. Appellant Vasquez was again advised of his rights, this time by officer Contreras, and confessed in full about his participation in the smuggling conspiracy. In enviable detail, appellant Vasquez stated to officer Contreras that he had been the "money man" for the transaction, that he and the others had been waiting at a local motel for the marijuana to be brought across the border, that they had received word from an unidentified source in Mexico that "someone had put the finger on

the deal," and that they had gone out onto the highway to warn the other participants not to bring the marijuana across the border. As fate would have it, appellant Vasquez and the others were too late to salvage the illicit scheme. At 10:00 a.m., the same morning, appellant Vasquez was taken before a magistrate.

We turn first to the argument that the officers of the El Paso Police Department who stopped the Dodge van at 2:30 a.m. lacked the requisite probable cause to arrest and detain appellant Vasquez and the other suspects. In reviewing probable cause decisions made by law enforcement officers in the field, we look to the totality of the circumstances revealed by the record. See Beck v. Ohio, 379 U.S. 89, 91, 85 S.Ct. 223, 13 L.Ed.2d 142 (1964). If the arresting and detaining officers are acting on information relayed by police transmission facilities, then the Government must demonstrate that the information so provided "itself had a reasonable foundation." United States v. Impson, 482 F.2d 197, 199 (5 Cir.), cert. denied, 414 U.S. 1009, 94 S.Ct. 371, 38 L.ED.2d 246 (1973); see Whiteley v. Warden, 401 U.S. 560, 91 S.Ct. 1031, 28 L.ED.2d 306 (1971). And where, as here, there is at least minimal communication between the different arms of the law, we look to the "collective knowledge" of the law enforcement authorities in question. See United States v. Nieto, 510 F.2d 1118, 1120 (5 Cir. 1975); United States v. Trabucco, 424 F.2d 1311, 1315 (5 Cir.), cert. denied, 399 U.S. 918, 90 S.Ct. 2224, 26 L.Ed.2d 785 (1970); Moreno-Vallejo v. United States, 414 F.2d 901, 904 (5 Cir. 1969), cert. denied, 400 U.S. 841, 91 S.Ct 82, 27 L Ed.2d 76 (1970). Thus, if Customs Patrol officers Epps and Wright possessed sufficient factual information to support a determination of probable cause to arrest and detain, then the actual arrest and detention one hour later by El Paso police officers acting on the information relayed by Communications Sector was supported similarly by probable cause.

There can be no question but that law enforcement

authorities nad probable cause to arrest and detain appellant Vasquez. When officers Epps and Wright first observed the Dodge van in which appellant Vasquez was riding, the hour was late. See United States v. Pearson, 448 F.2d 1207, 1212 (5 Cir. 1971). Moreover, the area around Farm Road 192 is sparsely populated. See United States v. Maslanka, 501 F.2d 208, 212 (5 Cir. 1974). Officer Epps testified that it was highly unusual to see any traffic on Farm Road 192 in the early morning hours. Both Epps and Wright had worked in the area for over a year, and neither recognized the Ford van, the Dodge van, or the gold Toronado as local in origin. The events that transpired after the crash of the Ford van, of course, provided the weightiest support for the decision to arrest and detain appellant Vasquez. While flight from a law enforcement officer cannot support alone a determination of probable cause, flight can provide in appropriate circumstances the key ingredient justifying the decision of a law enforcement officer to take action. See United States v. Jacquillon, 469 F.2d 380, 385 (5 Cir. 1972); Johnson v. Middlebrooks, 383 F.2d 386 (5 Cir. 1967). We consider the events transpiring on Farm Road 192 appropriate to the application of this principle.[1] We hold that the arrest and detention of appellant Vasquez was supported by probable cause; there was no illegal taint on appellant's subsequent confession to officer Contreras.

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We do not find it necessary to rely upon the testimony of officer Epps that the Ford van "appeared to meet" the Dodge van and the gold Toronado. Officer Epps was unable upon cross-examination to point to a single objective fact to support his testimony. See Appendix at 191. A decision to arrest and detain must, of course, rest on more than mere suspicion See United States v. Watson, ___ U.S. ___, 96 S.Ct.820, 824-25, 46 L.Ed.2d 598 (1976); Gerstein v. Pugh, 420 U.S. 103, 113, 95 S.Ct. 854, 43 L.Ed.2d 54 (1975); Ker v. California, 374 U.S. 23, 34-35, 83 S.Ct. 1623, 10 L. Ed.2d 726 (1963); Draper v. United States, 358 U.S. 307 79 S.Ct. 329, 3 L.Ed.2d 327 (1959); United States v. McCann, 465 F.2d 147, 157-58(5 Cir. 1972), cert. denied, 412 U.S. 927, 93 S.Ct. 2747, 37 L.Ed.2d 154 (1973); Dood v. Beto, 435 F.2d 868 (5 Cir. 1968).

Appellant Vasquez argues, in the alternative, that the facts surrounding his arrest and detention destroyed the voluntariness of his confession to officer Contreras. The district court held the required evidentiary hearing on the issue of voluntariness and found against appellant Vasquez. See Jackson v. Denno, 378 U.S. 368, 84 S.Ct. 1774, 12 L.Ed.2d 908 (1964). The standard that we apply in reviewing the district court's finding of voluntariness is that of clear error, see, e. g., United States v. Maxwell,484 F.2d 1350, 1352-53 (5 Cir. 1973), and on the instant record, we are unable to say that the finding of voluntariness was clearly erroneous. See Schneckloth v. Bustamonte, 412 U.S. 218, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973), The time between appellant Vasquez's arrest and confession was approximately six hours, a not excessive period of pre-confession detention given the late hour at which the Dodge van was stopped by El Paso police officers. Moreover, appellant Vasquez delivered his confession to an El Paso police detective whom he had requested by name, and the confession was preceded by at least two separate readings to appellant of his Miranda rights. The trial court, as was its prerogative in the role of trier of fact, rejected as incredible testimony that appellant Vasquez was subjected to brutality when he was initially arrested and detained by El Paso police officers. The burden was on the Government to show voluntariness by a preponderance of the evidence, see Lego v. Twomey, 404 U.S. 477, 92 S.Ct. 619, 30 L.Ed.2d 618 (1972), and we are of the decided opinion that the Government discharged properly its burden in this case. The confession of appellant Vasquez was admissible to show guilt.

As a final point, appellant Vasquez challenges the introduction below of certain testimony claimed to be violative of Bruton v. United States, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968). See United States v. Gray, 462 F.2d 164 (5 Cir. 1972); Posey v. United States, 416 F.2d 545 (5 Cir. 1969). After the Dodge van had been stopped by El Paso police officers, DEA agent Fuentes questioned one of the occupants of the van, Paublo Aguilar. At trial, agent Fuentes testified that

during this questioning, Aguilar stated that appellant Vasquez had picked him up on the night of February 25, 1976, and that he (Aguilar)

> went down there to assist in the transportation of marijuana. They followed a certain route - I can't recall the exact details, something to the effect that they turned their lights on and off that he did not known who was going to bring the marijuana across and that all he was going to do was assist in the transportation of the marijuana.
>
> . . . . . .
>
> (Aguilar) just made the comment that it was all a big mistake, and that he was real disappointed about everything.

Appendix at 280, 284.

Assuming, without deciding, that the testimony of agent Fuentes was a technical violation of Bruton, the introduction of the testimony was, in our view, harmless error beyond a reasonable doubt. See Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1966). The evidence introduced by the Government against appellant Vasquez, other than the challenged portion of agent Fuentes' testimony, was overwhelming. See Harrington v. California, 395 U.S. 250, 254, 89 S.Ct. 1726, 23 L.Ed.2d 284 (1969). In particular, the Government introduced the detailed confession by appellant Vasquez to officer Contreras, which we have held to be fully voluntary and untainted by an alleged illegal arrest and detention. We reject appellant Vasquez's Bruton argument, in addition to the others proffered by appellant, and we affirm his convictions under sections 841(a)(1) and 846 accordingly.

As indicated above, appellant Chavez-Cortinas concedes in effect that propriety of his conviction under section 841(a)(1) for possession of marijuana with intent to distribute; he argues, however, that the

Government did not introduce sufficient evidence to sustain the jury's verdict of guilty on the conspiracy charged under section 846.[2] We disagree. Aside from the evidence introduced by the Government that established clearly appellant's possession of the marijuana carried in the Ford van, the following items of evidence, in our view, supported the jury's finding that appellant was a participant in the conspiracy: The flight of the Dodge van and the Toronado away from the site on Farm Road 192 where the Ford van crashed suggests strongly that the three vehicles were more than coincidently on the road together. Indeed, appellant Vasquez confessed to officer Contreras that he and the others had gone out onto the highway to warn the van not to bring the marijuana across. Officer Contreras testified that Vasquez told him that two unidentified individuals would transport the marijuana across the border and guard it pending inspection by the buyers. The jury was justified in concluding the Chavez-Cortinas and Moreno, who was killed in the crash of the Ford van, were the two individuals designated, except by name, in the confession to officer Contreras. Finally, the other occupant of the Ford van, Moreno, was identified by appellant Vasquez's girl friend, who testified for the Government, as being present in a motel room with the other conspirators. Examining all the evidence in a commonsense manner, and in the light most favorable to the Government, we conclude that the jury's finding of guilty on the conspiracy count was fully support by the evidence. See Glasser v. United States, 315 U.S. 60, 62 S.Ct. 457, 86 L.Ed 680 (1942). A conspiracy by its very nature is clandestine, and the Government can rely on circumstantial evidence to establish the existence of the conspiracy and the identity of its members.

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Appellant argues also that double jeopardy and common law merger principles bar a simultaneous prosecution for conspiracy and the underlying substantive offense. The argument is without merit. See Matthews v. United States, 407 F.2d 1371 (5 cir. 1969). cert. denied, 398 U.S. 968, 90 S.Ct. 2177, 26 L.Ed.2d 554 (1970).

see Blumenthal v. United States, 332 U.S. 539, 68 S.Ct. 248, 92 L.Ed. 154 (1947). In the instant case, the Government's circumstantial evidence was adequate to the task.

The convictions of appellants Vasquez and Chavez-Cortinas are in all respects

AFFIRMED

APPENDIX "B"

United States Court of Appeals

FIFTH CIRCUIT

EDWARD W. WADSWORTH
CLERK

OFFICE OF THE CLERK

600 CAMP STREET
NEW ORLEANS, LA. 70130
TELEPHONE 504-589-6514

August 2, 1976

Mr. Dan W. Benedict, Clerk
U. S. District Court
U. S. Courthouse, Rm. 108
El Paso, TX 79901

No. 75-3623 - U.S.A. v. Roberto Vasquez & Ernesto Chavez-Cortinas

(District Court No. EP-75-CR-281)

Dear Sir:

(X) Enclosed is a certified copy of the judgment of this Court in the above case issued as and for the mandate.

( ) Enclosed is a certified copy of the Rule 21 Decision in the above case issued as and for the mandate.

( ) Having received from the Clerk of the Supreme Court a copy of the order of that court denying certiorari, I enclose a certified copy of the judgment of this Court in the above case, issued as and for the mandate.

( ) We have received a certified copy of an order of the Supreme Court denying certiorari in the above cause. This court's judgment as mandate having already been issued to your office, no further order will be forthcoming.

Enclosed herewith are the following additional documents:

(X) Copy of the Court's opinion.

(X) Original record on appeal or review. (2 volumes)

( ) Original exhibits.

( ) Bill of Costs approved by this Court.

Very truly yours,

EDWARD W. WADSWORTH, Clerk

By Mary Beth Breaux
Deputy Clerk

enc. (LETTER ONLY)
cc: Mr. Joseph A. Calamia
Mr. Charles M. Mallin
Mr. William Hardie, Esq.
Mr. Sam Dwyer and
Ms. Alice Dwyer

PART D.—OFFENSES AND PENALTIES

§ 841. Prohibited acts A—Unlawful acts

(a) Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or

(2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance.

Penalties

(b) Except as otherwise provided in section 845 of this title, any person who violates subsection (a) of this section shall be sentenced as follows:

(1) (A) In the case of a controlled substance in schedule I or II which is a narcotic drug, such person shall be sentenced to a term of imprisonment of not more than 15 years, a fine of not more than $25,000, or both. If any person commits such a violation after one or more prior convictions of him for an offense punishable under this paragraph, or for a felony under any other provision of this subchapter or subchapter II of this chapter or other law of the United States relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 30 years, a fine of not more than $50,000, or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a special parole term of at least 3 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a special parole term of at least 6 years in addition to such term of imprisonment.

(B) In the case of a controlled substance in schedule I or II which is not a narcotic drug or in the case of any controlled substance in schedule III, such person shall be sentenced to a term of imprisonment of not more than 5 years, a fine of not more than $15,000, or both. If any person commits such a violation after one or more prior convictions of him for an offense punishable under this paragraph, or for a felony under any other provision of this subchapter or subchapter II of this chapter or other law of the United States relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 10 years, a fine of not more than $30,000, or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a special parole term of at least 2 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a special parole term of at least 4 years in addition to such term of imprisonment.

(2) In the case of a controlled substance in schedule IV, such person shall be sentenced to a term of imprisonment of not more than 3 years, a fine of not more than $10,000, or both. If any person commits such a violation after one or more prior convictions of him for an offense punishable under this paragraph, or for a felony under any other provision of this subchapter or subchapter II of this chapter or other law of the United States relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 6 years, a fine of not more than $20,000, or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a special parole term of at least one year in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a special parole term of at least 2 years in addition to such term of imprisonment.

(3) In the case of a controlled substance in schedule V, such person shall be sentenced to a term of imprisonment of not more than one year, a fine of not more than $5,000, or both. If any person commits such a violation after one or more convictions of him for an offense punishable under this paragraph, or for a crime under any other provision of this subchapter or subchapter II of this chapter or other law of the United States relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 2 years, a fine of not more than $10,000, or both.

(4) Notwithstanding paragraph (1) (B) of this subsection, any person who violates subsection (a) of this section by distributing a small amount of marihuana for no remuneration shall be treated as provided in subsections (a) and (b) of section 844 of this title.

Special parole term

(c) A special parole term imposed under this section or section 845 of this title may be revoked if its terms and conditions are violated. In such circumstances the original term of imprisonment shall be increased by the period of the special parole term and the resulting new term of imprisonment shall not be diminished by the time which was spent on special parole. A person whose special parole term has been revoked may be required to serve all or part of the remainder of the new term of imprisonment. A special parole term provided for in this section or section 845 of this title shall be in addition to, and not in lieu of, any other parole provided for by law.

Pub.L. 91-513, Title II, § 401, Oct. 27, 1970, 84 Stat. 1260.

§ 846. Attempt and conspiracy

Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

Pub.L. 91-513, Title II, § 406, Oct. 27, 1970, 84 Stat. 1265.